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PUBLIC INTEREST GROUPS' LITIGATION ALTERNATIVES

Jaclyn S. Wanemaker *

Although American interest groups litigate for a multiplicity of reasons, it has long been surmised¹ that the decision to litigate in furtherance of interest group goals is largely motivated by the group's resources. As Jayanth K. Krishnan demonstrated by studying Israeli public interest groups,² many other factors influence whether interest groups resort to legal action, and if so, which type of legal action.

PUBLIC INTEREST ACTIVISM

"Public-interest activism is based on a mistrust of both business and government."³ Its goal is to increase government power⁴ to balance the disparity between business and government control.

The importance of American interest groups increased dramatically since the 1950s. Because the number of groups has substantially increased, as has their credibility,⁵ much reliance is placed upon such groups for policy ideas.

The formation and effectiveness of interest groups in the political process are contingent upon a number of factors. First, competition with political parties makes it difficult for interest

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¹ Susan M. Olson, *Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 J. POL. 854, 855 (1990).

² Jayanth K. Krishnan, *Public Interest Litigation in a Comparative Context*, 20 BUFF. PUB. INT. L. J. 19 (2002).

³ David Vogel, *The Public-Interest Movement and the American Reform Tradition*, 95 POL. SCI. Q. 607, 609 (1981).

⁴ *Id.* at 619.

⁵ Anthony Nownes and Patricia Freeman have labeled this activity a "symptom of uncertainty." Anthony Nownes & Patricia Freeman, *Interest Group Activity in the States*, 60 J. POL. 86, 86 (1998).

groups to accomplish legislative recognition and attention to their goals. Second, the autonomy of the legislature allows it to control its level of receptiveness to new policy considerations. Third, the closeness of the relationship between the executive branch and interest groups influences political openness to the acceptance of interest groups. Fourth, procedures for implementing interest group demands must be in place to facilitate their influence. Fifth, the centralization of government is important because interest group victories are more difficult to appreciate if control is fragmented. Sixth, the more control the government has over the economy, the less able interest groups are to challenge doctrines. Finally, judicial independence is very important to the success of interest groups.⁶

Factors determinative of interest group composition, strategy and tactics include: (1) policies of the resident state, (2) unification of the policy process, (3) state resource allocation, (4) political attitudes, (5) state government bureaucratization, (6) political sophistication of the population, (7) public disclosure law extensiveness, and (8) enforcement and access to campaign finance.⁷

STRATEGY AND TACTICS

Interest groups employ a variety of strategies and tactics to further their goals. Jeffrey Berry evaluated the effectiveness of advocacy tactics used by public interest groups.⁸ He divided strategies of advocacy into four categories: (1) law, (2) embarrassment and confrontation, (3) information, and (4) constituency influence and pressure. Specific tactics were evaluated within these classifications. Strategies of the legal process involve litigation and administrative intervention;

⁶ Herbert P. Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16 BRIT. J. POL. SCI. 57, 64 (1986).

⁷ THE POLITICS OF INTERESTS 162 (Mark Petracca ed., Westview Press 1992).

⁸ JEFFREY M. BERRY, LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS 214 (Princeton Univ. Press 1977).

embarrassment and confrontation includes protests, whistle-blowing, actions by shareholders, and the release of research results; information encompasses lobbying and congressional testimony; and constituency influence and pressure includes letter writing, contact by influential supporters, voting records and campaign contributions.⁹ Berry's research demonstrates that "personal presentation" to policymakers is the most effective method.¹⁰ Litigation ranked fourth behind letter writing and contact by influential supporters.¹¹

More general examples of strategies include narrowing issues in order to appeal to a broad category of followers while not "[challenging] fundamental values"¹² and concomitantly attracting "overlapping membership bases,"¹³ which may require compromising issues if necessary.¹⁴ Other commonly used tactics are monitoring¹⁵ the progress of policymakers through supporter networks,¹⁶ utilizing the media when needed,¹⁷ and contacting influential decision-makers.¹⁸

A. Litigation

Public interest groups litigate more than other types of interest groups because of the increased opposition against them.¹⁹ Richard Cortner's Political Disadvantage Theory stresses the

⁹ *Id.* at 263.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 389.

¹⁴ *Id.*

¹⁵ Nownes & Freeman, *supra* note 5, at 86.

¹⁶ Joyce Gelb & Marian Lief Palley, *Women and Interest Group Politics: A Comparative Analysis of Federal Decision-Making*, 41 J. POL. 362, 363 (1979).

¹⁷ *See id.* at 373.

¹⁸ *See id.*

¹⁹ Olson, *supra* note 1, at 865.

importance of litigation to interest groups unable to accomplish their goals through other means²⁰ as a result of the general hostility to them.

Susan Olson finds that factors influencing whether interest groups litigate include standing rules, the concreteness of the desired rights,²¹ and the group's opposition, including the opposition's resources.²² Also, if an interest group requires an injunction to fulfill a goal or if the group's opposition has already filed suit, no other remedy may be available.²³

When public interest groups litigate, the issues are usually based on constitutional law in order to allow judiciaries to develop policy.²⁴ Litigating interest groups choose one of two strategies: sponsoring cases or submitting amicus curiae briefs.²⁵ The choice depends upon whether the group desires direct control over the case.²⁶ Variation among liberal groups here is commonplace. For example, the National Association for the Advancement of Colored People ["NAACP"] normally sponsors cases while the American Civil Liberties Union ["ACLU"] prefers to submit briefs.²⁷

Litigation has many advantages. The ability to control timing is essential²⁸ since the makeup of the courts may be critical. Also, class action lawsuits can remedy standing problems by replacing plaintiffs with mootness issues.²⁹

²⁰ *Id.* at 855 (1990).

²¹ *Id.* at 863.

²² *Id.* at 861.

²³ *Id.*

²⁴ Karen O'Conner and Lee Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. POL. 479, 479 (1983).

²⁵ *Id.* at 482.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Berry, *supra* note 8, at 202.

²⁹ *Id.* at 201-02.

B. Amicus Curiae Briefs

Instead of litigating an issue, interest groups are increasingly participating in the legal process by submitting amicus curiae briefs. Gregory Caldeira and John Wright's study of such participation reveals that amicus curiae briefs are extremely influential.³⁰ Not only does brief submission enhance the chance of a potential case being granted certiorari by the United States Supreme Court, but evidence shows that amicus curiae briefs are also very persuasive at the decision level.³¹ Because of the potentially astronomical costs of litigation today, the choice to participate via amicus curiae briefs may also be less expensive.

C. Personal Contacts

Anthony Nownes and Patricia Freeman found that the most reliable advocacy methods today are legislative testimony and direct contact with policymakers.³² Legislative contact includes notification of the effects of pending legislation, contact by influential group supporters and aid in bill drafting.³³ Nownes and Freeman identified litigation as a "sparsely used technique."³⁴

The importance of maintaining a sophisticated staff cannot be undermined since legislators place great reliance on testimony and lobbying. Also, having influential personnel is crucial when making personal contacts to policymakers and when administrative appointments are made.³⁵ The ability to influence judicial appointments cannot be undermined.³⁶

³⁰ Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 788 (1990).

³¹ *Id.*

³² *Id.* at 91.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 169.

³⁶ *Id.* at 192.

The scope and acceptance of lobbying have broadened in recent years. There are many types of lobbyists who work for interest groups, including in-house lobbyists, government liaisons, volunteer lobbyists, private lobbyists, and contract lobbyists.³⁷

D. Other Methods

Forming coalitions among public interest lobbies is a popular and effective method of gaining power.³⁸ Soliciting support directly through mailing, telephone and television is an effective and modern way to reach potential members.³⁹ With the current availability of consumer interest lists, the names of those possibly interested in joining a public interest organization are readily accessible to groups who can afford it. Often, the names of these potential members appear on such lists without the approval of consumers, so this method can be unsuccessful, depending on the list's source.

Direct solicitation is criticized for its encouragement of single-issue interest groups,⁴⁰ which generally have a slim chance of survival. Those contacted perhaps would have been willing to join a group with broader views, but experience with the bothersome communication discourages them from joining any group.

CONCLUSION

It is imperative to consider the political and economic climate of a country when assessing its ability to cultivate interest groups. Perhaps the reason litigation is no longer relied upon to a great extent in the United States is that so many other legitimate and effective means of influence exist.

³⁷ The Politics of Interests, *supra* note 7, at 156-57.

³⁸ *See id.* at 254-56.

³⁹ *See id.* at 308.

⁴⁰ *Id.* at 321.